

No. 07-834

IN THE
Supreme Court of the United States

RADIAN GUARANTY, INC.,

Petitioner,

v.

WHITNEY WHITFIELD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

**BRIEF FOR AMICUS CURIAE STATE FARM
MUTUAL AUTOMOBILE INSURANCE COMPANY
IN SUPPORT OF PETITIONER**

SHEILA L. BIRNBAUM
Counsel of Record
DOUGLAS W. DUNHAM
ELLEN P. QUACKENBOS
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036
(212) 735-3000

Counsel for Amicus Curiae

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. CERTIORARI SHOULD BE GRANTED BECAUSE THE THIRD CIRCUIT'S DECISION IS DIRECTLY CONTRARY TO THIS COURT'S DECISION IN <i>SAFECO</i> <i>INSURANCE CO. V. BURR</i> BOTH IN RESULT AND ANALYSIS	5
II. THE THIRD CIRCUIT'S DECISION, IF ALLOWED TO STAND, WILL IMPEDE THE GOALS AND POLICIES OF FCRA AND BURDEN PARTIES AND THE COURTS WITH EXPENSIVE, PROTRACTED AND UNNECESSARY LITIGATION	10
CONCLUSION	12

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Arnstein v. Porter</i> , 154 F.2d 464 (2d Cir. 1946).....	12
<i>Broessel v. Third Guaranty Insurance Corp.</i> , No. 1:04-CV-4-M, 2007 WL 2155691 (W.D. Ky. July 25, 2007).....	8
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	11, 12
<i>Klutho v. Home Loan Center, Inc.</i> No. 4:06CV1212, 2007 WL 2155691 (W.D. Ky. July 25, 2007)	8
<i>Murray v. GMAC Mortgage Corp.</i> , No. 05 C 1229, 2007 WL 2317194 (N.D. Ill. July 23, 2007).....	7
<i>Panter v. Marshall Field & Co.</i> , 646 F.2d 271 (7th Cir. 1981).....	7
<i>Safeco Insurance Co. v. Burr</i> , 127 S. Ct. 2201 (2007).....	<i>passim</i>
<i>Washington Post Co. v. Keogh</i> , 365 F.2d 965 (D.C. Cir. 1966)	7, 11
<i>Whitfield v. Radian Guaranty, Inc.</i> , 501 F.3d 262 (3d Cir. 2007).....	<i>passim</i>
Statutes and Rules	Page(s)
15 U.S.C. § 1681	1, 10

Amending Fair Credit Reporting Act, S. Rep. No.
108-166 (2003), *available at* 2003 WL 22399643 11

Federal Rule of Civil Procedure 56..... 11, 12

Fair and Accurate Credit Transactions Act of 2003,
H.R. Rep. 108-263 (2003), *available at* 2003 WL
22064665..... 11

INTEREST OF AMICUS CURIAE¹

Amicus curiae State Farm Mutual Automobile Insurance Company ("State Farm") is one of the largest automobile insurance companies in the United States and does business nationwide.

Insurance companies, including State Farm, and other businesses that use credit information and are subject to the provisions of the Fair Credit Reporting Act ("FCRA"), must sometimes regulate their conduct based upon readings of statutory provisions contained in the FCRA that are susceptible of more than one reasonable interpretation and whose meaning has not yet been authoritatively determined. By their nature, the transactions in which a company or business must determine what if any action is required by FCRA are often repetitive transactions involving large numbers of consumers. As a consequence, insurance companies and other businesses subject to FCRA have been the target of multiple putative class action lawsuits, which as a matter of course allege "willful noncompliance" with the requirements of the statute.

Accordingly, the question presented in this case – when, under this Court's controlling precedent, the issue of willfulness should and must be resolved in the defendant's favor as a matter of law – is of great importance to State Farm, as it is to other insurance companies and users of credit information.²

¹ No counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. The parties have been given at least 10 days notice of the intention of *amicus* to file.

² While the private right of action for failure to give the adverse action notification required by 15 U.S.C. § 1681m(a) has now been eliminated, *see* 15 U.S.C. § 1681m(h)(8), many such class action litigations remain pending. Moreover, insurance companies, like other businesses, are affected by FCRA's requirements in numerous other contexts that require

The defendant in this case based its determination that it was not required under FCRA to issue an adverse action notice on two points of statutory interpretation: first, that the initial rate on an insurance policy does not constitute an “increase” for the purpose of FCRA’s definition of adverse action, and second, that there had been no adverse action because it was not in a direct relationship, contractual or otherwise, with Plaintiffs, but provided mortgage insurance to the mortgage company that provided Plaintiffs with a mortgage. As to the first point, the Third Circuit’s decision improperly postponed resolution on summary judgment of the issue of whether the defendant’s reading of the statute was objectively reasonable and therefore not reckless or willful as a matter of law, erroneously disregarding the analytical framework established by this Court in *Safeco Insurance Co. v. Burr*, 127 S. Ct. 2201 (2007). As to the second, the Third Circuit erroneously held that the issue could not be resolved on summary judgment at all but presented questions for the factfinder, again disregarding *Safeco*.

This Court’s decision in *Safeco* provided the federal district and appellate courts with a clear and efficient analytical framework for determining the issue of willfulness where a defendant’s reading of the statute is at issue. If allowed to stand, the Third Circuit’s decision will facilitate huge class action litigations against users of credit information, with the enormous pressure to settle that the threat of such litigations create – even where the defendant acted in reliance on an objectively reasonable interpretation of the legal requirements of the FCRA. The Third Circuit’s decision will improperly burden the use of credit information, impeding vital economic activity, to the detriment of businesses, consumers and the national economy.

The Third Circuit’s decision not only disserves the goals and purposes of FCRA, but also harms courts and litigants by preventing expeditious resolution of meritless claims of willfulness, burdening the courts with unnecessarily protracted litigation, and subjecting defendants to unnecessary and intrusive discovery on the issue of

interpretation of the statutory requirements, often without definitive guidance from the courts.

willfulness. The Third Circuit's decision is also likely to result in forum shopping and an improper concentration of FCRA litigation in the courts of that Circuit.

SUMMARY OF ARGUMENT

In *Safeco Insurance Co. v. Burr*, 127 S. Ct. 2201 (2007), the Court held that the issue of willfulness under 15 U.S.C. § 1681n(a) should be determined as a matter of law in favor of a defendant when the defendant has acted based upon a reading of the statute that "albeit erroneous, was not objectively unreasonable." 127 S. Ct. at 2215-16. In such a case, further factual development, including evidence of the defendant's subjective bad faith, is irrelevant. *Id.* at 2216 n.20. Applying these principles, this Court held that the defendant's reading of FCRA's adverse action provision as not applying to initial applications for insurance was not willful as a matter of law, specifically instructing that "there was no need for [the Court of Appeals] to remand the case[] for factual development." *Id.* at 2216.

The Third Circuit entirely failed to address and resolve the threshold issue under *Safeco* of whether Radian's readings of the statute were objectively reasonable. Rather, the Third Circuit "le[ft] it to the District Court on remand to consider whether the *evidence in the record* supports Radian's claim that it did not willfully violate the statute because it reasonably believed an initial rate offer was not an increase for purposes of the definition of adverse action under the FCRA." *Whitfield v. Radian Guar., Inc.*, 501 F.3d 262, 270 (3d Cir. 2007) (emphasis added). Significantly, although the Third Circuit opined that in some unspecified way the situations in *Whitfield* and in *Safeco* "might not be analogous," the two cases involved precisely the same reading of the statute, arrived at by the two defendants during the same time period and in the same absence of definitive legal authority to the contrary. By remanding to the district court for further factual development, the Third Circuit eviscerated this Court's ruling in *Safeco* and the reasoning that underlies it.

The Third Circuit also failed to rule on the objective reasonableness of Radian's other statutory bases for believing that it was not required to give Plaintiffs an adverse action

notice – namely the facts that Plaintiffs were not in a contractual relationship with Radian and were not the purchasers, insureds or beneficiaries of the mortgage insurance at issue, and that Radian relied upon the loan risk assessment of Plaintiffs' mortgage lender which contracted with Radian for and was the beneficiary of the mortgage insurance. Instead of examining the objective reasonableness of this reading of the statute in light of the judicial and other authority extant at the relevant time, the Third Circuit simply held that the issue of willfulness with regard to that statutory interpretation presented an issue of fact for the factfinder.

The Third Circuit's failure to apply the legal analysis set forth by this Court in *Safeco* led the Third Circuit to reach a result that is in direct conflict with this Court's decision in *Safeco*. As such, the Third Circuit's decision warrants review and correction by this Court. Review is also warranted because the issue presented is one of national importance in the regulation of credit markets and credit reporting. The Third Circuit's decision improperly burdens the users and furnishers of credit information with the threat of protracted litigation of meritless claims of willful noncompliance and thwarts the appropriate use of summary judgment to avoid unnecessary trials, imposing significant burdens and expenditures on parties and the courts.

ARGUMENT**I. CERTIORARI SHOULD BE GRANTED
BECAUSE THE THIRD CIRCUIT'S DECISION
IS DIRECTLY CONTRARY TO THIS COURT'S
DECISION IN *SAFECO v. BURR* BOTH IN
RESULT AND ANALYSIS**

This Court's decision in *Safeco Insurance Co. v. Burr*, 127 S. Ct. 2201 (2007), recognized that the issue of willfulness under section 1681n(a) of the Fair Credit Reporting Act should be determined as a matter of law in favor of a defendant when the defendant has acted based upon a reading of the statute that "albeit erroneous, was not objectively unreasonable." 127 S. Ct. at 2215-16. In such a case, further factual development, including evidence of the defendant's subjective bad faith, is irrelevant. As this Court stated:

To the extent that [plaintiffs] argue that evidence of subjective bad faith can support a willfulness finding even when the company's reading of the statute is objectively reasonable, their argument is unsound. Where, as here, the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation, it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator. Congress could not have intended such a result for those who followed an interpretation that could reasonably have found support in the courts, whatever their subjective intent may have been.

Id. at 2216 n.20. Applying these principles, this Court held that the defendant's reading of FCRA's adverse action provision as not applying to initial applications for insurance was not willful as a matter of law, specifically instructing that "there was no need for [the Court of Appeals] to remand the case[] for factual development." *Id.* at 2216.

The Third Circuit's rulings in the instant case are directly

contrary to this Court's ruling in *Safeco* and the reasoning that underlies it. The Third Circuit improperly viewed the issue of whether Petitioner Radian's statutory readings of FCRA were objectively reasonable as requiring further factual development. *See Radian*, 501 F.3d at 270 ("We leave it to the District Court on remand to consider whether the *evidence in the record* supports Radian's claim that it did not willfully violate the statute because it reasonably believed an initial rate offer was not an increase for purposes of the definition of adverse action under the FCRA.") (emphasis added). The interpretation at issue – Radian's position that FCRA did not apply to an initial application for insurance because there was no "increase" in the rate – is the very same interpretation that this Court held to be objectively reasonable as a matter of law in *Safeco*. Moreover, that interpretation was acted upon by Radian in this case at approximately the same time as the defendant's conduct in *Safeco*.

The Third Circuit compounded its error by holding that Radian's other statutory bases for believing that an adverse action notice was not required (that FCRA's notice requirement did not apply where a company is not in a direct contractual relationship with the consumers and did not obtain a consumer credit report regarding the consumers from a consumer credit reporting agency³) raised factual issues that must be submitted to the jury. In particular, the Third Circuit suggested that Radian's reading of the statute as not requiring notice was not plausible because of the "essential factual concession . . . that Radian was in a position to identify and notify [Plaintiffs] notwithstanding that it had no direct relationship with them." 501 F.3d at 271. In so ruling, the Third Circuit simply omitted any analysis of whether such statutory readings were objectively reasonable in light of the language of the statute and the available regulatory and appellate authority.

The Third Circuit's erroneous rulings originate in its

³ Radian issued the mortgage insurance at issue in this case to Countrywide Mortgage Co., which provided the Plaintiffs with a mortgage. Countrywide applied for the mortgage insurance and provided Radian with the Plaintiffs' credit score. Countrywide was the policyholder and beneficiary of the insurance.

failure to follow the summary judgment analysis laid out by this Court's decision in *Safeco* for FCRA cases where a defendant has failed to comply with the requirements of the statute based upon an interpretation of the statute that later is adjudged incorrect. Looking to the common law, the Court recognized that "recklessness" is generally understood "in the sphere of civil liability as conduct violating an *objective* standard." *Safeco*, 127 S. Ct. at 2215 (emphasis added).⁴ For cases in which the issue of recklessness centers on a defendant's interpretation of statutory provisions, this Court formulated a two-part test for recklessness, holding that "a company . . . does not act in reckless disregard of [FCRA] unless the action is *not only* a violation under a reasonable reading of the statute's terms, *but* shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." *Id.* (emphasis added). The Court made clear that when the first prong of the test is not met, i.e., when the defendant's "reading of the statute, albeit erroneous, was not objectively unreasonable," "there is no need to pinpoint the negligence/recklessness line." *Id.*

Thus, under *Safeco*, the determination of whether a defendant's reading of the statute was objectively reasonable is the first step in the analysis, and only if the reading was objectively unreasonable, does the analysis proceed to a determination as to whether the reading was reckless or merely negligent.⁵ Factors relevant to the determination as

⁴ *Cf. Washington Post Co. v. Keogh*, 365 F.2d 965, 967-68 (D.C. Cir. 1966) (Wright, J.) ("That state of mind should generally be a jury issue does not mean it should always be so in all contexts, *especially where the issue is recklessness* which is ordinarily inferred from objective facts."); *see also Panter v. Marshall Field & Co.*, 646 F.2d 271, 282 (7th Cir. 1981) (same).

⁵ Federal District Courts in other Circuits have properly applied this Court's analysis in *Safeco*. *See, e.g., Murray v. GMAC Mortgage Corp.*, No. 05 C 1229, 2007 WL 2317194, at *2-3 (N.D. Ill. July 23, 2007) (*Safeco* "established a two stage process for determining whether or not a party's interpretation [of the FCRA] was reckless: first, the reading of the statute must have been objectively unreasonable; and second, in making that unreasonable determination the party must have run 'a risk of

to whether a defendant's reading of the statute is objectively reasonable include whether the reading has some "foundation in the statutory text," whether there is any "authoritative guidance" from the courts of appeals or the Federal Trade Commission that "might have warned [the defendant] away from the view it took," and whether the courts have found or could find the reading convincing. 127 S. Ct. at 2216.

Under the principles set forth in this Court's decision in *Safeco*, summary judgment in favor of Radian on the issue of willfulness was required. This Court has already held that it was not objectively unreasonable to believe that an initial rate for a new insurance policy was not an "increase" under FCRA. Notable, Radian took that position at approximately the same time as the defendants in the *Safeco* case – a time when there was no authoritative legal guidance to the contrary. Likewise, Radian was not objectively unreasonable in reading the FCRA as not applying to mortgage insurance that was issued to and provided insurance protection to a mortgage lender, not Plaintiffs, where the mortgage lender, not a consumer credit reporting agency, supplied Radian with Plaintiffs' credit score as part of the mortgage company's application for mortgage insurance. That reading had foundation in the statutory

violating the law substantially greater than the risk associated with a reading that was merely careless"; examining *Safeco* factors and holding that the defendant's reading of FCRA's statutory provisions regarding "firm offers" was not objectively unreasonable); *Klutho v. Home Loan Center, Inc.*, No. 4:06CV1212, 2007 WL 4191973, at *3 (E.D. Mo. Nov. 21, 2007) (granting summary judgment on FCRA claims of willful violations; holding that defendant's reading of the statute was not objectively unreasonable because it was "not contradicted by the statutory text" and had convinced some courts and because there was a "lack of judicial or administrative guidance"); *Broessel v. Triad Guar. Ins. Corp.*, No. 1:04-CV-4-M, 2007 WL 2155691, at *3 (W.D. Ky. July 25, 2007) (following *Safeco*, granting summary judgment on FCRA willful noncompliance claims where the defendant "shared Safeco's objectively reasonable, though mistaken belief" as to initial rates). The practical and legal impact of the Third Circuit's decision here is likely to overwhelm this handful of non-precedential district court opinions, making it difficult for companies to make business and legal decisions with any confidence that *Safeco* will be followed, especially given the large number of companies amenable to suit within the Third Circuit.

language, the District Court found it convincing and adopted it, and, at the time of the defendant's conduct (2001), there was no authoritative guidance from the courts of appeal or the Federal Trade Commission to the contrary.

In short, Radian's position clearly was "an interpretation that could reasonably have found support in the courts, whatever [its] subjective intent may have been." *Safeco*, 127 S. Ct. at 2216 n.20. Indeed, as in *Safeco*, the district court in this case ruled in Radian's favor. Moreover, as in *Safeco*, there was a "dearth" of judicial and other guidance that would have rendered Radian's readings untenable. Contrary to the Third Circuit's reasoning, the fact that Radian was able to provide notice, if required, is completely irrelevant to the legal issue of the reasonableness of its reading of the statute as not requiring notice by an insurer issuing mortgage insurance to a mortgagee to protect the mortgagee in its loan to a home buyer.

Thus, Radian's position that for multiple reasons the FCRA was inapplicable to its conduct in this case was based upon "objectively reasonable" readings of the "less-than pellucid" statutory text, rendering further inquiry into Radian's subjective intent or the factual circumstances improper and unnecessary under this Court's decision in *Safeco*. *Safeco*, 127 S. Ct. at 2216. As in *Safeco*, "the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation," and "it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator." *Safeco*, 127 S. Ct. at 2216 & n.20.

As shown above, the Third Circuit's failure to follow the mandated analysis is a fundamental legal error, warranting review by this Court.

II. THE THIRD CIRCUIT'S DECISION, IF ALLOWED TO STAND, WILL IMPEDE THE GOALS AND PURPOSES OF FCRA AND BURDEN THE PARTIES AND COURTS WITH EXPENSIVE, PROTRACTED AND UNNECESSARY LITIGATION

The significance of the Third Circuit's erroneous

